

Carl E. Kingston, #1826
3212 South State Street
Salt Lake City, Utah 84115
(801)486-1458

F. Mark Hansen, #4628
341 South Main, Suite 406
Salt Lake City, Utah 84111
Telephone: (801) 364-4040

Attorneys for Respondent
Co-op Mining Company

FILED

OCT 20 1994

SECRETARY, BOARD OF
OIL, GAS & MINING

BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES, STATE OF UTAH

IN THE MATTER OF THE REQUEST)
FOR AGENCY ACTION BY PETITIONERS)
NORTH EMERY WATER USERS)
ASSOCIATION, HUNTINGTON-CLEVELAND)
IRRIGATION COMPANY, and CASTLE)
VALLEY SPECIAL SERVICES DISTRICT)

MEMORANDUM IN SUPPORT OF
MOTION TO EXCLUDE EVIDENCE
ON GROUNDS OF COLLATERAL
ESTOPPEL

Docket No. 94-027
Cause No. ACT/015/025-93B

C.W. Mining Company d/b/a Co-op Mining Company (Co-op) respectfully submits this Memorandum of points and authorities in support of its Motion to exclude evidence and arguments by Petitioners relating to Co-op's mining activities before March of 1991, on the grounds any such inquiry is barred by collateral estoppel.

STATEMENT OF FACTS

1. In 1990 C.W. Mining Company d/b/a Co-op Mining Company (Co-op) applied for renewal of its mining permit.

2. Petitioners North Emery Water Users Association (NEWUA), Huntington-Cleveland Irrigation Company (HCIC), and Castle Valley Special Services District (CVSSD), along with Huntington City, all intervened to protest renewal of Co-op's permit.

3. On February 5, 1991 DOGM conducted an informal hearing during which Petitioners offered evidence to support their argument Co-op's mining activities had adversely impacted and would continue to adversely impact Birch Spring and Big Bear Spring. [DOGM record of hearing generally]

4. On March 13, 1991 NEWUA, CVSSD and Huntington City filed an Amended Memorandum of Law in Opposition to the Granting of Co-op's Applications. Petitioners' Memorandum argued Co-op's permit should not be renewed, again on the grounds Co-op's mining activities had adversely impacted and would continue to adversely impact Birch Spring and Big Bear Spring. [Petitioners' 03/13/91 Memorandum, p.11-18, 24-35; Ex. A, B, C]

5. On March 21, 1991 Co-op filed a Response in which Co-op argued Petitioners' allegations were not supported by the evidence. [Co-op's 03/21/91 Response, p.2-4]

6. On or about March 21, 1991 NEWUA, CVSSD and Huntington City filed a Reply to Co-op's Response, in which they again argued Co-op's mining operations contaminated and otherwise adversely affected Birch Spring and Big Bear Spring. Among other things, they argued Co-op was in violation of at least four of the exceptions to permit renewal set forth in U.C.A. §40-10-9(4)(a), which included alleged contamination of Birch Spring and Big Bear Spring, and failure to adequately safeguard against future contamination. [Petitioners' 03/21/91 Reply memorandum, p.2-5, 9-17, 23]

7. On May 20, 1991 DOGM entered an Order which provides in part:

FINDINGS OF FACT

4. Geologic and hydrologic evidence provided by the parties suggests that the potentiometric surface of the Blackhawk-Star Point aquifer is below the level of current mining in the Bear Canyon Mine.

5. The necessary information is available for evaluation of the hydrology within the existing Bear Canyon Mine workings.

6. There is no evidence that mining within the presently permitted coal seam in the Bear Canyon Mine will impact the potentiometric surface of the Blackhawk-Star Point aquifer.

CONCLUSIONS OF LAW

19. Protestants have set forth factual contentions to support their allegations that four of the five statutory exceptions to renewal are present. The Division concludes that protestants have failed to support these allegations.

ORDER

22. The Permit for Co-op Mining Company's existing mining operation at the Bear Canyon Mine (ACT/015/025) is hereby renewed

8. Petitioners did not request agency action or otherwise appeal DOGM's May 20, 1990 Order.

9. On or about July 22, 1994 DOGM issued an Order approving a Significant Revision to Co-op's mining permit, allowing Co-op to begin mining the Tank Seam in Bear Canyon.

10. On August 22, 1994 Petitioners filed an Appeal and Request for Agency Action, asking the Board for a hearing to allow Petitioners to "present oral argument and demonstrate the material damage which will result to their water resources if the Division's approval of the Significant Revision is not reversed or altered." Among other things, Petitioners allege:

4. Co-op has not taken adequate measures to protect Appellants/Petitioners' water sources either in its present mining areas or in its proposed mining area of the Tank Seam. Appellants/Petitioners are particularly concerned about the continuing integrity of their water sources given the material negative impacts on Big Bear and Birch Springs in the area of Co-op's mining operations which include the following:

a. Co-op's past mining operations have contaminated Big Bear Springs and Birch Spring and the aquifers feeding these springs.

b. Co-op's past mining operations have adversely and permanently impacted the level of flow of Big Bear and Birch Springs. The flows have significantly diminished as a result of Co-op's mining operations and have not recovered and/or recharged even after the "wet" water years.

c. Over the years, Co-op has been cited by the Division of Oil, Gas & Mining ("DOGM") for failing to adequately protect the hydrologic resources in the proximity of its mining operations.

[Petitioners' 08/22/94 Appeal]

ARGUMENT

Administrative actions subject to collateral estoppel are governed by the rules controlling the like effects of a court's judgment. 2 AmJur 2d Administrative Law §500. in Searle Bros. v. Searle, 588 P.2d 689, 691 (Utah 1978), the Utah Supreme Court adopted a four-part test to determine whether collateral estoppel, or issue preclusion, applies to bar parties from relitigating facts and issues in a subsequent suit that were fully litigated in an earlier suit:

1. Was the issue decided in the prior adjudication identical with the one presented in the action in question?
2. Was there a final judgment on the merits?
3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?
4. Was the issue in the first case competently, fully, and fairly litigated?

Under Searle Bros., collateral estoppel bars Petitioners from producing evidence and rearguing issues relating to the impact on Birch Spring and Big Bear Spring of Co-op's mining activities before March 1991.

1. THE ISSUES ARE IDENTICAL.

The issue raised in Petitioner's objection to Co-op's permit renewal was whether Co-op's mining activities had, to that time, adversely impacted Birch Spring or Big Bear Spring. [Facts 3-6]

Petitioners now allege that "Co-op's past mining operations have contaminated Big Bear Springs and Birch Spring and the aquifers feeding these springs," and that "Co-op's past mining operations have adversely and permanently impacted the level of flow of Big Bear and Birch Springs." [Fact 10] To the extent Petitioners' present allegations relate to Co-op's mining activities before March 1991 the issues are identical.

2. THERE WAS A FINAL JUDGMENT ON THE MERITS.

DOGM entered its Order on or about May 20, 1991, which included findings and conclusions that Co-op's pre-March 1991 mining activities had no adverse impact on Birch Spring or Big Bear Spring. [Fact 7] When no party appealed or requested further agency action, the Order became a final judgment on the merits. R645-300-200.

3. THE PARTIES ARE IDENTICAL.

Petitioners in this matter are the identical entities who intervened in and objected to Co-op's permit renewal application. [Facts 2, 10]

4. THE ISSUE WAS COMPETENTLY, FULLY, AND FAIRLY LITIGATED.

In Copper State Thrift & Loan v. Bruno, 735 P.2d 387, 391 (Utah App. 1987), the Court stated:

The final element of collateral estoppel requires that the issue was competently, fully, and fairly litigated in the first forum. This element stems from fundamental due process and requires that litigants have their day in court. For purposes of due process, the parties must receive notice reasonably calculated, under all the circumstances, to apprise them of the pendency of the action and afford them an opportunity to present their objections.

...

[T]he record demonstrates Copper State was given adequate notice as it was present at the hearing and had an opportunity to fully and fairly litigate the issue ...

...

Copper State fully participated in the confirmation hearing and had an opportunity to present witnesses on its behalf. Copper State cross-examined the

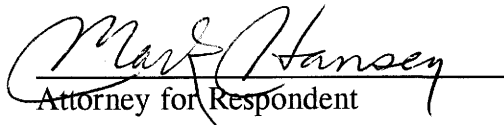
debtor extensively Furthermore, Copper State took the initiative to have the precise issue of the co-maker's liability specifically addressed by the bankruptcy court when it filed its Motion for Order of Clarification, which Motion was denied with prejudice. The notice which Copper State received was sufficient to apprise Copper State of the action and afforded Copper State an opportunity to present its objections and arguments, which it in fact did.

As to the issue at hand -- the impact on Birch Springs and Big Bear Springs of Co-op's mining activities before March 1991 -- Petitioners had their "day in court," and lost. Petitioners had adequate notice as they were present at the February 5, 1991 DOGM hearing, and had an opportunity to fully and fairly litigate the issue. In fact, it was Petitioners who raised the issue, and who had the burden of proof on the issue. Petitioners fully participated in the hearing and had an opportunity to present witnesses, evidence and arguments on the issue, which Petitioners did. NEWUA and CVSSD in particular expressly raised the specific issue in the memoranda they filed with DOGM. HCIC either filed its own separate memoranda or had the opportunity to do so but chose not to.

CONCLUSION

For the reasons stated above, Petitioners should be barred by collateral estoppel from offering evidence or argument, or otherwise relitigating the issue whether Co-op's mining activities before March of 1991 had any adverse impact on Birch Spring or Big Bear Spring.

DATED this 19 day of October, 1994.



Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing a copy thereof, properly addressed, with postage prepaid, to:

David B. Hartvigsen
NIELSEN & SENIOR
1100 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111
Attorneys for
North Emery Water Users' Association and
Huntington-Cleveland Irrigation Company

Jeffrey W. Appel
Michele Mattsson
APPEL & MATTSSON
9 Exchange Place, Suite 1100
Salt Lake City, Utah 84111
Attorneys for
Castle Valley Special Service District

Dated at Salt Lake City, Utah this 19 day of October, 1994.

A handwritten signature in cursive script, reading "Mark J. Hansey", is written over a horizontal line.

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